APPENDIX A

Memorandum

Under a state of facts substantially similar to *McCann* v. *Newport News Shipbuilding and Dry Dock Company*, 177 F. Supp. 909, and other applicable authorities from the Supreme Court of Appeals of Virginia and the United States Court of Appeals for the Fourth Circuit, the defendant's motion for summary judgment must be sustained.

On July 16, 1962, plaintiff, an employee of McLean Contracting Company, was engaged in erecting two cranes which the defendant had purchased in Pittsburgh, Pennsylvania, and which had been shipped to the defendant's shipyard at Newport News, Virginia, in a disassembled condition. McLean was primarily engaged in doing the welding and structural steel work in erecting the cranes, and the defendant, using its own employees and equipment performed the balance of the work. Plaintiff, when injured, was in the area of the crane cab and allegedly was knocked to the ground while assisting other McLean employees in erecting certain structural steel plates on one of the cranes being assembled.

The uncontradicted evidence establishes that the defendant had previously erected a number of cranes, using its own personnel and equipment and, further, that it was capable of doing all of the work necessary to erect such cranes without assistance from McLean or any other party. Where the work of the defendant calls for the use of defendant's caterpillar or crawler-type cranes in other areas of the shipyard operation, or where the defendant's welders are otherwise engaged, McLean frequently takes over this portion of the work.

Defendant is certified by the Industrial Commission of Virginia as a self-insurer under the Virginia Workmen's Compensation Act. Plaintiff applied for and has received (or is still receiving) the benefits from McLean's compensation insurance carrier.

The immediate question thus far is whether plaintiff was a statutory employee of the defendant under § 65-26 of the Code of Virginia, 1950 as amended. We hold that he was and that the work being performed was a part of defendant's normal trade, business or occupation. The defendant was not an "other party" within the meaning of § 65-38. The action is barred under §§ 65-37 and 65-99. *McCann* v. *Newport News Shipbuilding and Dry Dock Company, supra; Sykes* v. *Stone & Webster Engineering Corporation,* 186 Va. 116, 41 S.E. (2d) 469; *Feitig* v. *Chalkley,* 185 Va. 96, 38 S.E. (2d) 73; *Rea* v. *Ford,* 198 Va. 712, 96 S.E. (2d) 92; *Williams* v. *E. T. Gresham Co.,* 201 Va. 457, 111 S.E. (2d) 498; *Anderson* v. *Thorington Construction Company,* 201 Va. 266, 110 S.E. (2d) 396; *Doane* v. *E. I. DuPont de Nemours & Co.,* 4 Cir., 209 F. (2d) 921; *Floyd* v. *Mitchell,* 203 Va. 269, 123 S.E. (2d) 369; *Walker* v. *United States Gypsum Company,* 4 Cir., 270 F. (2d) 857, cert. den. 363 U.S. 805.

Plaintiff's argument that the issue as to whether he was a statutory employee of defendant must be submitted to the jury under the doctrine pronounced in *Byrd* v. *Blue Ridge Electric Corp.,* 356 U.S. 525, and *Magenau* v. *Aetna Freight Lines,* 360 U.S. 273, is sufficiently answered to the contrary in *Walter* v. *United States Gypsum Company, supra.*

An attempt is made to strengthen plaintiff's case by alleging punitive damages and a claim for first aid mishandling immediately following the injury. Assuming, without deciding, that defendant rendered first aid treatment which can be characterized as negligence, it avails the plaintiff nothing. Section 65-86 of the Code of Virginia, 1950 as amended, expressly provides that the consequences of any malpractice shall be deemed part of the injury resulting from the accident and that the injured employees shall be compensated for such malpractice as a part and parcel of the original injury. It is also settled that an employer is liable to pay compensation for any aggravation of the original injury, even if such aggravation arises by

reason of malpractice. *Fauver* v. *Bell*, 192 Va. 518, 65 S.E. (2d) 575; *Lynchburg Foundry Co.* v. *Irvin*, 178 Va. 265, 16 S.E. (2d) 646.

Plaintiff cites certain cases which, at first blush, would appear to support his theory that a separate cause of action exists for the alleged first aid mishandling. *Vessel* v. *Jardine Mining Co.*, 110 Mon. 82, 100 P. (2d) 75; *Ruth* v. *Witherspoon-Englar Co. (Kan.)*, 179 P. 403; *Denes* v. *R. M. Hollingshead Co. (N.J.)*, 145 A. 321; *Shipley* v. *Wellwood Silk Throwing Mills (Tenn.)*, 47 S.W. (2d) 561. The difficulty with these authorities is that the statutes of the various states involved do not call for the mandatory payment by the employer of the medical attention to the employee. Indeed, the *Vessel* case in referring to the Montana statute, states:

> "The Act does not require the employer to furnish medical aid, and there is no hospital contract between appellant and respondent. In jurisdictions where the Act requires the employer to furnish medical aid, or where the employee submits to the employer's selected physician or surgeon, it has been held that the Workmen's Compensation Act is exclusive, on the theory, it would seem, that if the employer is bound to furnish medical aid, or if the employee submits to the employer's selected physician, then the employer should be protected and the Compensation Fund should pay the employee for any additional or new injury sustained. In our opinion the Workmen's Compensation Act of Montana cannot be so construed."

The same rule applies in Kansas, New Jersey and Tennessee. As we know, Virginia requires the employer to furnish medical aid; it requires the injured employee to submit to treatment by the employer's selected physician subject to certain exceptions not here pertinent; and it makes the employer responsible for malpractice. Thus, Virginia follows the general rule as stated in 127 A.L.R. 1110.

Virginia has ruled that, in order to maintain an action for punitive or exemplary damages, a finding of compensatory damages is a prerequisite. *Zedd* v. *Jenkins*, 194

Va. 704, 74 S.E. (2d) 791. Assuming arguendo that, on presentation of the facts, willful action or misconduct on the part of the defendant may be shown, the claim is barred by § 65-37 which provides that the remedies afforded by the Act "shall exclude all other rights and remedies." If such was not the situation, the Virginia Workmen's Compensation Act could be completely thwarted by the simple expedient of alleging punitive damages. Some states reserve to the injured employee the common law remedy caused by willful action or misconduct of the employer. 58 *Am. Jur., Workmen's Compensation,* § 54. Virginia has not reserved this right by statute and, in light of § 65-37, we must conclude that punitive damage actions are not maintainable in such a situation.

Plaintiff relies upon a line of Texas decisions[1] which, plaintiff argues, holds that if the injured employee shows that he would be *entitled* to actual or compensatory damages but for the Compensation Act, then he may recover punitive damages in an appropriate case. To the contrary, the Texas rule is applicable only in cases involving the *death* of the employee under § 26 of Article 16 of the Texas Constitution which provides:

> "Every person, corporation or company that may commit a homicide through willful act or omission, or through gross neglect, shall be responsible in exemplary damages to the surviving husband, widow, or heirs of his or her body or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide."

The Texas Workmen's Compensation Act expressly provides that employees under the Act are deemed to have waived their common law rights to recover damages for injuries sustained in the course of their employment. *Revised Civil Statutes,* Art. 8306, § 3a. However, the Texas

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[1] *Fort Worth Elevators Co.* v. *Russell,* 123 Tex. 128, 70 S.W. (2d) 397; *Morton Salt Co.* v. *White,* 123 Tex. 151, 70 S.W. (2d) 409; *Bonner* v. *Texas Co.,* 5 Cir., 89 F. (2d) 291; *Dudley* v. *Community Public Service Co.,* 5 Cir., 108 F. (2d) 119.

Workmen's Compensation Act, in apparent recognition of the Texas Constitution, provided in *Revised Civil Statutes*, Art. 8306, § 5, the following:

> "Nothing in this law shall be taken or held to prohibit the recovery of exemplary damages by the surviving husband, wife, heirs of his or her body, or such of them as there may be of any deceased employee whose death is occasioned from the willful act or omission or gross negligence of any person, firm or corporation, from the employer of such employee at the time of the injury causing the death of the latter . . . ."

Indeed, the Texas cases involving personal injuries specifically exclude the right to recover punitive or exemplary damages. *Castleberry* v. *Frost-Johnson Lumber Co. (Tex.)*, 283 S.W. 141; *Jones* v. *Jeffreys (Tex.)*, 224 S.W. (2d) 924.

As applied to this case, therefore, the Texas law is in accord with Virginia. We hold that neither the allegation nor proof of punitive damages is sufficient to remove the case from § 65-37 of the Code of Virginia.

Present order following presentation to counsel for plaintiff for inspection and endorsement.

/s/ WALTER E. HOFFMAN
United States District Judge

Order

The Motion for Summary Judgment, previously filed herein by the Defendant, having been duly brought on to be heard, and the Court having filed herein a Memorandum dated August 5, 1965, sustaining the aforesaid Motion, it is accordingly

ORDERED that judgment be, and the same hereby is, entered in favor of the Defendant, dismissing this action.

ENTERED: August 26, 1965

/s/ WALTER E. HOFFMAN
United States District Judge

APPENDIX B

Order

Upon consideration of plaintiff's motion for rehearing filed herein on September 8, 1965, subsequent to the filing of an opinion sustaining a motion for summary judgment on August 5, 1965, and the entry of an order granting summary judgment dated August 25, 1965, it is

ORDERED that the motion for rehearing filed on September 8, 1965, be and it hereby is, DENIED, to which action of the Court the plaintiff excepts.

The Court notes, in the motion for rehearing, that plaintiff now asserts, for the first time, a violation of the Virginia Safety Appliance Act, §§ 40-55 and 40-56, Code of Virginia. The complaint does allege the defendant's duty to enforce safety regulations, but makes no assertion that the crane in question was not protected by adequate safety device. Nor is such contention advanced in the brief filed by plaintiff's counsel, although plaintiff refers to page 3 of his brief relating to regulations which would have prohibited the accident. Moreover, and assuming that the question was inferentially raised in the brief, while the violation of the Virginia Safety Appliance Act may constitute negligence on the part of the actual or statutory employer, there is nothing therein contained which tends to remove the applicability of the Virginia Workmen's Compensation Act. The latter Act is designed to cover situations in which the employer and employee, or either of them, may be negligent. Plaintiff's reliance upon § 65-8, Code of Virginia, 1950, is misplaced. The only purpose of this statute is to negate any relief from *penalty* for failure or neglect to perform any statutory duty. The employer's liability is not based upon tort. *Glassco* v. *Glassco,* 195 Va. 239, 77 S.E. (2d) 843. The word "accident" within comprehension of the Virginia Workmen's Compensation Act includes all accidents actionable at law and all former non-actionable accidents except in case of intentional and willful miscon-

duct on the part of the employee. *Burlington Mills Corporation* v. *Hagood*, 177 Va. 204, 210, 13 S.E. (2d) 291, 293; *Fauver* v. *Bell*, 192 Va. 519, 65 S.E. (2d) 575.

Since any further discovery processes would, at best, lead only to possible proof of a violation of the Virginia Safety Appliance Act, there is no merit to plaintiff's motion for rehearing. Ample opportunity was afforded plaintiff to prepare his case in opposition to defendant's motion for summary judgment. Under date of July 16, 1965, a letter was received from plaintiff's counsel in lieu of a reply brief. In this letter plaintiff's counsel states, "The matter is thus ready for your decision." The opinion was thereafter prepared and filed on August 5, 1965.

/s/ WALTER E. HOFFMAN
United States District Judge

Norfolk, Virginia
September 14, 1965

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 10354

WENDELL EVANS, *Appellant*,

v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY, *Appellee*.

Appeal from the United States District Court for The Eastern District of Virginia, at Newport News
Walter E. Hoffman, Chief District Judge

(Argued May 2, 1966 Decided May 11, 1966.)

Before Bryan and Bell, Circuit Judges, and Field, District Judge.

Urban A. Lester (Albert H. Greene, Robert L. Murphy, Robert M. Stefanon, and Larson & Greene on brief) for Appellant, and Phillips M. Dowding for Appellee.

PER CURIAM:

For serious personal injuries suffered by Wendell Evans on July 16, 1962 while working as a welder in the erection of cranes at the Virginia shipyard of the Newport News Shipbuilding and Dry Dock Company, he sued for damages, alleging the company's negligence as the cause of the accident. At the time, he was in the employ of McLean Contracting Company, which had been engaged by the shipbuilding company to install two cranes. The action was dismissed—and rightly we think—on Shipbuilding's motion for summary judgment.

Decision was grounded on the Virginia Workmen's Compensation Act, Code of 1950, as amended, §§ 65-26 and -37, declaring an employee's right to compensation under this statute to be his exclusive remedy. The Act bars a suit

by an employee of a contractor or sub-contractor against the owner of the project if the employee is injured in work which is "a part of the [owner's] trade, business or occupation". Concededly the requirements of the Act have been met and the plaintiff Evans has accepted its benefits.

The record discloses no genuine issues upon the material facts in the case and they bring him squarely within the Act. Hence his sole remedy is the recovery of statutory compensation. This was the view of the District Court in dismissing the action.

Affirmed.

APPENDIX D

"*Section 65-26. Liability of owner to workmen of sub-contractors.* When any person (in this section and Sections 65-28 and 65-29 referred to as "owner") undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and Sections 65-28 and 65-31 referred to as "sub-contractor") for the execution or performance by or under such sub-contractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay any workmen employed in the work any compensation under this Act which he would have been liable to pay if the workmen had been immediately employed by him."

§ 65-37. *Employee's rights under Act exclude all others.*— The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death.

§ 65-38. *Subrogation of employer to employee's rights against third parties; evidence; recovery; compromise.*—The making of a lawful claim against an employer for compensation under this Act for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce, in his own name or in the name of the injured

employee or his personal representative, the legal liability of such other party. . . .

§ 65-85. *Duty to furnish medical attention; effect of refusal of employee to accept.*—For a period not exceeding ninety days after an accident the employer shall furnish or cause to be furnished, free of charge to the injured employee, such necessary medical attention, and where such accident results in the amputation of an arm, hand, leg, or foot or the enucleation of an eye or the loss of any natural teeth, the employer shall furnish the initial prosthetic appliance and shall furnish proper fitting thereof, the total cost not to exceed one thousand dollars, as the nature of the accident may require, and the employee shall accept, and during the whole or any part of the remainder of his disability resulting from the injury, the employer may, at his own option, continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician, unless otherwise ordered by the Industrial Commission, and in addition, such surgical and hospital service and supplies as may be deemed necessary by the attending physician or the Industrial Commission. When, in the judgment of the Industrial Commission, or a member thereof, the facts require a reasonable extension of such medical care beyond such period of ninety days, the Commission, or a member thereof, may, in its or his discretion, require the employer to furnish free of charge to the injured employee such medical attention for a reasonable time after the termination of the ninety-day period, but not in excess of two years including such period of ninety days.

The refusal of the employee to accept such service when provided by the employer shall bar the employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of suspension unless, in the opinion of the In-

dustrial Commission, the circumstances justified the refusal. In any such case the Industrial Commission may order a change in the medical or hospital service.

If in an emergency on account of the employer's failure to provide the medical care during the period herein specified, or for other good reasons, a physician other than that provided by the employer is called to treat the injured employee, during said period, the reasonable cost of such service shall be paid by the employer if ordered so to do by the Industrial Commission.

"*Section 65-99. Duty to insure payment of compensation; effect of insurance.* Every employer subject to the compensation provisions of this Act shall insure the payment of compensation to his employees in the manner hereinafter provided. While such insurance remains in force he or those conducting his business shall only be liable to an employee for personal injury or death by accident to the extent and in the manner herein specified."